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Protracted conflicts in the GUAM area and their implications for international peace, security and development

The situation in the occupied territories of Azerbaijan

Elimination of racism, racial discrimination, xenophobia and related intolerance

Promotion and protection of human rights

The rule of law at the national and international levels

Letter dated 30 April 2012 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General

I have the honour to bring to your attention the report on the international legal rights of the Azerbaijani internally displaced persons and the Republic of Armenia's responsibility (see annex). The report addresses the following issues: (a) the violation of the rights of the citizens of the Republic of Azerbaijan by their forcible displacement (or expulsion or deportation) from the occupied territories of the Republic of Azerbaijan (Daghlyq Garabagh (Nagorno-Karabakh) and surrounding areas) by the armed forces of the Republic of Armenia or by subordinate forces for which it is internationally responsible; (b) the violation of the principle of non-discrimination in regard to Azerbaijani internally displaced persons, including the implantation of ethnic Armenian settlers in the occupied territories of Azerbaijan; (c) the prevention of access of Azerbaijani internally displaced persons to their property in the occupied territories by Armenia and those for whom it is responsible; (d) the right of return of Azerbaijani internally displaced persons to their homes in the internationally recognized territory of the Republic of Azerbaijan; and (e) the consequences flowing from the violation of the rights of the Azerbaijani internally displaced persons, including restitution and compensation.

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I should be grateful if you would have the present letter and its annex circulated as a document of the General Assembly, under agenda items 35, 39, 67, 69 and 83, and of the Security Council.

(*Signed*) Agshin **Mehdiyev**
Ambassador
Permanent Representative

Annex to the letter dated 30 April 2012 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General

Report on the international legal rights of the Azerbaijani internally displaced persons[1] and the Republic of Armenia's responsibility

1. The present report addresses the following issues:

(a) The violation of the rights of the citizens of the Republic of Azerbaijan by their forcible displacement (or expulsion or deportation) from the occupied territories of the Republic of Azerbaijan (Nagorno-Karabakh[2] and surrounding areas) by the armed forces of the Republic of Armenia or by subordinate forces for which it is internationally responsible;

(b) The violation of the principle of non-discrimination in regard to Azerbaijani internally displaced persons, including the implantation of ethnic Armenian settlers in the occupied territories of Azerbaijan;

(c) The prevention of access of Azerbaijani internally displaced persons to their property in the occupied territories by Armenia and those for whom it is responsible;

(d) The right of return of Azerbaijani internally displaced persons to their homes in internationally recognized territory of the Republic of Azerbaijan;

(e) The consequences flowing from the violation of the rights of the Azerbaijani internally displaced persons, including restitution and compensation.

I. Preliminary issues

A. The Constitutional background

2. It is helpful at this stage to lay out some of the key facts underpinning the legal situation to be discussed in this paper. Both Armenia and Azerbaijan existed as republics within the Union of Soviet Socialist Republics (USSR) from the early 1920s with Nagorno-Karabakh possessing the status of an autonomous oblast (NKAO) within the Soviet Socialist Republic of Azerbaijan (Azerbaijan SSR) as

[1] It is to be emphasized that this paper does not deal at all with the rights of refugees under international law (that is, displaced persons who have crossed an international frontier), but confines itself to the rights of internally displaced persons within the framework of the internationally recognized territory of the Republic of Azerbaijan which is currently occupied by the Republic of Armenia.

[2] The term "Nagorno-Karabakh" (or "Nagorny Karabakh" or Nagorno Karabakh) is a Russian translation of the original name in the Azerbaijani language — Dağlıq Qarabağ (pronounced Daghlyq Garabagh), which literally means mountainous Garabagh. Garabagh in its turn consists of two Azerbaijani words: "qara" (black) and "bağ" (garden). In order to avoid confusion the widely referred terms "Nagorno Karabakh", "Nagorny Karabakh" or "Karabakh" will be used here, as appropriate.

from 1923.[3] The present-day stage of the conflict between Armenia and Azerbaijan began at the end of 1987[4] with the former's overt territorial claims on Nagorno-Karabakh and the attacks on the Azerbaijanis both in the autonomous oblast and Armenia itself. These actions marked the beginning of the expulsion of Azerbaijanis from the Armenian SSR and Nagorno-Karabakh, as well as initiated taking a number of illegal decisions aimed at unilateral secession of the NKAO from the Azerbaijan SSR. On 20 February 1988, the members of the Armenian community represented in the local self-government institutions of the NKAO adopted a resolution seeking the transfer of the autonomous oblast from the Azerbaijan SSR to the Armenian SSR (within the USSR). This was accepted by the Armenian SSR on 15 June 1988, but was rejected by the Azerbaijan SSR two days previously and again on 17 June 1988.

3. On 12 July 1988, the members of the Armenian community of the NKAO adopted a decision on the unilateral secession of the autonomous oblast from the Azerbaijan SSR. Azerbaijan rejected that decision the same day, declaring it null and void.

4. On 18 July 1988, the Presidium of the Supreme Soviet of the USSR, the body with the primary relevant authority, made a formal decision to leave the NKAO within the Azerbaijan SSR. In other words, it was confirmed that Nagorno-Karabakh formed part of the Azerbaijan SSR.

5. On 1 December 1989, the Supreme Soviet of the Armenian SSR passed a resolution calling for the unification of Armenia with Nagorno-Karabakh. However, on 10 January 1990, the Presidium of the Supreme Soviet of the USSR adopted a resolution on the "Nonconformity With the USSR Constitution of the Acts on Nagorno-Karabakh Adopted by the Armenian SSR Supreme Soviet on 1 December 1989 and 9 January 1990", declaring the illegality of the claimed unification of the Armenian SSR with Nagorno-Karabakh without the consent of the Azerbaijan SSR.

6. On 2 September 1991, the Armenians of Nagorno-Karabakh adopted a "Declaration of Independence of the Nagorno-Karabakh Republic" ("NKR"). This was declared invalid by Azerbaijan and on 27 November 1991 by the USSR State Council and the following day by the USSR Committee of the Constitutional Oversight. However, the Armenian side did not cease its unlawful and provocative actions. Thus, a "referendum on independence" was held in Nagorno-Karabakh on 10 December 1991 (without the support or consent of Azerbaijan of which it legally constituted a part), which was confirmed two days later by an "Act on the Results of the Referendum on

[3] On 7 July 1923, the Central Executive Committee of the Azerbaijan SSR adopted a Decree "On the Formation of the Nagorno-Karabakh Autonomous Oblast". Nagorno-Karabakh as an autonomous oblast within the Azerbaijan SSR was referred in the USSR Constitutions of 1936 (art. 24) and 1977 (art. 87), while its legal status was governed by the Law "On the Nagorno-Karabakh Autonomous Oblast" adopted by the Supreme Soviet of the Azerbaijan SSR on 16 June 1981. See also Thomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*, New York, 2003; Svante E. Cornell, "The Nagorno-Karabakh Conflict", 1999, Report No. 46, Department of East European Studies, University of Uppsala; International Crisis Group, "Nagorno-Karabakh: Viewing the Conflict From the Ground", Europe Report No. 166, 14 September 2005.

[4] According to Thomas de Waal, as early as in February 1986 one activist of the separatist movement, Muradian, travelled to Moscow from Yerevan "with a draft letter that he persuaded nine respected Soviet Armenian Communist Party members and scientists to sign" with the purpose of separation of Nagorno-Karabakh from Azerbaijan and its annexation to Armenia, op. cit., pp. 17-20.

the Independence of the Nagorno-Karabakh Republic". On 28 December that year, "parliamentary elections" were held there and on 6 January 1992, the newly convened "parliament" of the separatist entity adopted a "Declaration of Independence", followed two days later by the adoption of a "Constitutional Law 'On Basic Principles of the State Independence of the Nagorno-Karabakh Republic'". Thus, the process of unilateral secession from Azerbaijan was instituted.

7. Azerbaijan had declared independence on 18 October 1991. This was confirmed on 29 December 1991 by a nationwide referendum. On 8 December 1991, a formal declaration was made by the States-founders of the USSR that "the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists".[5]

8. Armenia's view is that following the collapse of the USSR, on the territory of the former Azerbaijan SSR two States were formed: the Republic of Azerbaijan and the "Nagorno-Karabakh Republic" and that "[t]he establishment of both States has similar legal basis".[6]

9. However, this approach is fundamentally flawed. The critical period for the purposes of the legitimate inheritance of territorial frontiers (the principle of *uti possidetis*) is the period immediately preceding independence. The International Court has made this very clear. In *Burkina Faso/Mali*, for example, the Court declared that:[7]

> "The essence of this principle [*uti possidetis*] lies in its primary aim of securing respect for the territorial boundaries *at the moment when independence is achieved*" (emphasis added).

10. What mattered, therefore, from the point of view of international law, was the frontier "which existed at the moment of independence".[8] The position in this regard as far as Azerbaijan (including Nagorno-Karabakh) and Armenia are concerned is clear. On the eve of the independence of Azerbaijan, the unlawfulness within the Soviet legal system of any attempts aimed at either unification of Nagorno-Karabakh with Armenia or its secession from Azerbaijan without Azerbaijan's consent was confirmed at the highest constitutional level. Azerbaijan did not so consent, so that the definition of the territory of Azerbaijan as it proceeded to independence and in the light of the applicable law clearly included Nagorno-Karabakh. Accordingly, Azerbaijan was entitled to come to independence within the territorial boundaries that it was recognized as having as the Azerbaijan SSR within the USSR.

11. The factual basis for the operation of the legal principle of *uti possidetis* is beyond dispute in this case. It follows from this that Armenia's claims as to the claimed "independence" of Nagorno-Karabakh or its unification with Armenia are contrary to the internationally accepted principle of *uti possidetis* and therefore unsustainable in international law.

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[5] Agreement Establishing the Commonwealth of Independent States, 8 December 1991, 31 *International Legal Materials* 143 (1992).

[6] See e.g. United Nations document A/63/781-S/2009/156, 24 March 2009, p. 11, para. 43.

[7] ICJ Reports, 1986, pp. 554, 566. This was reaffirmed in *El Salvador/Honduras*, ICJ Reports, 1992, pp. 351, 386-7.

[8] Ibid., p. 570.

12. In contrast to what Armenia asserts in regard to "NKR", almost from their very inception, the Republics of Armenia and Azerbaijan committed themselves — like other parties to the Alma-Ata Declaration of 21 December 1991 — to: "Recognizing and respecting each other's territorial integrity and the inviolability of existing borders".[9] The 1993 Charter of the Commonwealth of Independent States (CIS), to which both Armenia and Azerbaijan are parties, stresses, in article 3, the principle of "inviolability of State frontiers, recognition of existing frontiers and renouncement of illegal acquisition of territories".[10] Indubitably, a firm stand was taken by all the States members of CIS, to retain their former administrative (intra-State) borders as their inter-State frontiers following the dissolution of the USSR.[11]

13. The Security Council of the United Nations explicitly referred in its resolutions 853 (1993), 874 (1993) and 884 (1993), adopted in response to the occupation of the territories of Azerbaijan, to "the conflict in and around the Nagorny Karabakh region of the Azerbaijani Republic", while "*Reaffirming* the sovereignty and territorial integrity of the Azerbaijani Republic and of all other States in the region", as well as "the inviolability of international borders". Similar language had been used earlier in resolution 822 (1993). United Nations General Assembly resolution 62/243 of 14 March 2008 is phrased along the same lines: "*Reaffirms* continued respect and support for the sovereignty and territorial integrity of the Republic of Azerbaijan within its internationally recognized borders". The European Court of Human Rights has recently concluded that "the 'NKR' is not recognized as a State under international law by any countries or international organizations".[12]

14. The situation following the independence of Azerbaijan and actions of Armenia is also clear. Any attempt by Armenia to encourage, procure or sustain the secession of Nagorno-Karabakh is simply unlawful in international law as amounting to a violation of the principle of the respect for the territorial integrity of sovereign States and imports the responsibility of that State.[13]

B. Armenia's intervention and continuing occupation: the fundamental facts

15. The fact that Armenian forces seized the territories of Azerbaijan, including but not limited to the Nagorno-Karabakh area, has been well evidenced. For example, in its Fact Sheet on the History of the Minsk Conference, dated 30 March 2001, the United States Department of State wrote that:

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[9] Alma-Ata Declaration, 1991, 31 *International Legal Materials* 147, 148 (1992).

[10] Charter of the Commonwealth of Independent States, 1993, 34 *International Legal Materials* 1279, 1283 (1995).

[11] See Steven R. Ratner, "Drawing a Better Line: *Uti Possidetis* and the Borders of New States", 90 *American Journal of International Law* 590, 597 (1996).

[12] *Elkhan Chiragov and Others v Armenia*, ECHR Judgement of 14 December 2011, para. 102.

[13] See e.g. the following reports: "The Legal Consequences of the Armed Aggression of the Republic of Armenia Against the Republic of Azerbaijan", United Nations document A/63/662-S/2008/812, 24 December 2008; "The Fundamental Norm of the Territorial Integrity of States and the Right to Self-determination in the Light of Armenia's Revisionist Claims", United Nations document A/63/664-S/2008/823, 29 December 2008; "The International Legal Responsibilities of Armenia as the Belligerent Occupier of Azerbaijani Territory", United Nations document A/63/692-S/2009/51, 27 January 2009.

"In May 1992, Armenian and Karabakhi forces seized Susha (the historical, Azerbaijani-populated capital of the region) and Lachin (thereby linking N-K to Armenia). By October 1993 Armenian and Karabakhi forces eventually succeeded in occupying almost all of N-K, Lachin and large areas in southwestern Azerbaijan. As Armenian and Karabakhi forces advanced, hundreds of thousands of Azerbaijani refugees fled to other parts of Azerbaijan".[14]

16. In the report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe concerning "The Conflict over the Nagorno-Karabakh Region Dealt with by the OSCE Minsk Conference", dated 29 November 2004, it was emphasized that: "Armenians from Armenia had participated in the armed fighting over the Nagorno-Karabakh region besides local Armenians from within Azerbaijan".[15]

17. Further, the Human Rights Watch report entitled "Seven Years of Conflict in Nagorno-Karabakh" published in 1994 refers at several points to the involvement of forces from Armenia in the conflict with Azerbaijan including the statement of an ICRC official[16] and concluded that: "While Armenia has supported Karabakh forces since the beginning of the conflict, evidence gathered by Human Rights Watch/ Helsinki establishes the involvement of the Armenian army as part of its assigned duties in the conflict, especially since December 1993".[17] This report also refers to testimony from Armenian prisoners of war as evidencing that Armenian army units were sent into Nagorno-Karabakh in 1993-4.[18] This included an interview with one Armenian draftee who said that he had been sent to Lachin in April 1993.[19] The report concluded by stating that: "As a matter of law, Armenian troop involvement in Azerbaijan makes Armenia a party to the conflict and makes the war an international armed conflict, as between the government of Armenia and Azerbaijan".[20]

18. The Secretary-General of the United Nations stated in his 1993 report to the Security Council: "Reports of the use of heavy weaponry, such as T-72 tanks, Mi-24 helicopter gunships and advanced fixed-wing aircraft are particularly disturbing and would seem to indicate the involvement of more than local ethnic forces".[21] Indeed, the Representative of the Secretary-General noted in his report dated 25 January 1999 that: "It is generally accepted that the Karabakh Armenian cause has received considerable economic and military support from Armenia and the ethnic Armenian diaspora".[22]

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[14] United States Department of State: Fact Sheet on the History of the Minsk Conference, issued on 30 March 2001.

[15] Document 10364. Explanatory Memorandum by the Rapporteur (David Atkinson), part III, para. 6.

[16] www.hrw.org/en/reports/1994/12/01/seven-years-conflict-nagorno-karabakh, at pp. 31-32. See also p. 49.

[17] Ibid., at p. 67.

[18] Ibid., pp. 68-72.

[19] Ibid., at p. 72.

[20] Ibid., at p. 73.

[21] Report of the United Nations Secretary-General pursuant to the statement of the President of the Security Council in connection with the situation relating to Nagorny-Karabakh, United Nations document S/25600, 14 April 1993, para. 10.

[22] Report of the Representative of the United Nations Secretary-General, Francis M. Deng, "Profiles in Displacement: Azerbaijan", United Nations document E/CN.4/1999/79/Add.1, 25 January 1999, p. 8, para. 23.

19. This clear intervention in the territory and domestic affairs of an independent sovereign State did not, however, end with the ceasefire negotiated at Bishkek on 5 May 1994. Mounting evidence demonstrates the grip that Armenia continues to have upon Nagorno-Karabakh and the other occupied territories of Azerbaijan that had been seized during the conflict.

20. The United States Department of State, in its human rights report on Armenia for 2006, declared that: "Armenia continues to occupy the Azerbaijani territory of Nagorno-Karabakh and seven surrounding Azerbaijani territories".[23] The equivalent report on Azerbaijan noted that: "Armenian forces controlled most of Nagorno-Karabakh, as well as large portions of adjacent Azerbaijani territory"[24] and "Armenia continues to occupy the Azerbaijani territory of Nagorno-Karabakh and seven surrounding Azerbaijani territories".[25]

21. In the above-mentioned 2004 Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe concerning the conflict, it was further noted that: "Today, Armenia has soldiers stationed in the Nagorno-Karabakh region and the surrounding districts, people in the region have passports of Armenia, and the Armenian Government transfers large budgetary resources to this area".[26]

22. In its report on presidential elections held in Armenia on 16 and 30 March 1998, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE) declared that: "it is of extreme concern that one of the mobile boxes has crossed the national border of the Republic of Armenia to collect votes of Armenian soldiers stationed abroad (Kelbajar)".[27] In other words, that Armenian troops are based in the occupied territories of Azerbaijan is acknowledged by international observers and formally reported by OSCE. Further, such troops were permitted by Armenia to participate in the presidential elections of March 1998.

23. Documents emanating from the Minsk Conference — the OSCE process which is aimed at providing an ongoing forum for discussions towards a negotiated settlement of the conflict — also demonstrate the existence of Armenian soldiers in the occupied territories. For example, the "package" proposal of July 1997 contained a requirement in Agreement I on the end of hostilities, that "The armed forces of Armenia will be withdrawn to within the borders of the Republic of Armenia",[28] while the "step-by-step" proposals of December 1997 provided that "All Armenian forces located outside of the borders of the Republic of Armenia will be withdrawn to locations within those borders"[29] and the "common State" proposal of November 1998 similarly contained a requirement that "All armed forces of Armenia deployed outside of the borders of the Republic of Armenia will be withdrawn to within those

[23] Country Reports on Human Rights Practices, 2006, Armenia, sect. 1 (a).

[24] Country Reports on Human Rights Practices, 2006, Azerbaijan, introductory section.

[25] Ibid., sect. 1 (a).

[26] Explanatory memorandum by the Rapporteur (David Atkinson), op. cit, part III, para. 6.

[27] Final report issued on 9 April 1998, p. 8. The footnote to this sentence notes that "This sentence was changed on April 15, 1998, to read as follows: Moreover it is of extreme concern that one of the mobile boxes has crossed the national border of the Republic of Armenia to collect votes of Armenian soldiers posted in the region of Kelbajar". Kelbajar is in the occupied territory of Azerbaijan.

[28] Unofficial translation from the Russian original, reproduced in the key texts section of *Accord*, 2005, published by Conciliation Resources, at p. 77.

[29] Ibid., p. 79.

borders".[30] Such provisions would not have been laid down in the absence of the deployment of Armenian forces within the occupied areas of Azerbaijan.

24. Various NGO reports attest to the presence of Republic of Armenia forces in Nagorno-Karabakh and other occupied territories of the Republic of Azerbaijan. The International Crisis Group Report of 14 September 2005, for example, concluded that there was a high degree of integration between the forces of Armenia and Nagorno-Karabakh and that substantial weaponry, equipment and training was provided by Armenia to Nagorno-Karabakh.[31] The European Court of Human Rights has concluded that Republic of Armenia forces serve in the occupied areas and indeed that the detention, questioning and prosecution of such soldiers took place in the occupied territories.[32]

25. Instances of non-combat violence among Armenian military personnel serving in the occupied territories of Azerbaijan also provide a solid piece of evidence testifying to this country's military presence on those territories. Several incidents that took place in recent times and were acknowledged by the Ministry of Defence of the Republic of Armenia revealed that the servicemen involved had the Republic of Armenia's citizenship, were drafted into that country's armed forces and assigned to serve in the occupied territories of Azerbaijan by the Republic of Armenia's Military Registration and Enlistment Office.[33]

26. To summarize: Armenian soldiers drafted into the Republic of Armenia's armed forces by that country's Military Registration and Enlistment Office are assigned to serve in the occupied territories of Azerbaijan;[34] Armenian soldiers serving in the occupied Nagorno-Karabakh have voted in Republic of Armenia elections;[35] Armenian residents of Nagorno-Karabakh travelling abroad use Armenian passports;[36] Nagorno-Karabakh "is closely tied to Armenia and highly dependant on its financial inputs. All transactions are done via Armenia and products produced in Nagorno-Karabakh often are labelled 'made in Armenia' for export. Yerevan provides half the budget" so that "Nagorno-Karabakh is highly dependent on external financial support, primarily from Armenia";[37] while the same persons often hold high political offices, including the highest, at different times both in Nagorno-Karabakh and Armenia. Indeed, the current President of Armenia served for four years as head of the "NKR Self-Defence Forces Committee" from 1989 to 1993,[38] while the previous President had been "President of the NKR" in the three preceding years.[39] Finally, the Government of Armenia has encouraged and facilitated the settlement of ethnic Armenian settlers within the occupied

[30] Ibid., p. 83.

[31] International Crisis Group Report of 14 September 2005, op. cit., p. 10.

[32] *Haratyunyan v Armenia*, ECHR Judgement of 28 June 2007, paras. 4, 5 and 17, in particular; and *Zalyan, Sargsyan and Serobyan v Armenia*, ECHR Judgement of 11 October 2007, pp. 2, 3 and 11, in particular.

[33] See e.g. United Nations documents A/65/601-S/2010/615, 7 December 2010; A/65/808-S/2011/226, 11 April 2011; A/66/528-S/2011/668, 27 October 2011.

[34] See above, paras. 21, 24 and 25.

[35] See above, para. 22.

[36] See above, para. 21.

[37] International Crisis Group Report of 14 September 2005, op. cit., p. 12.

[38] See www.president.am/president/biography/eng/.

[39] See www.president.am/library/presidents/eng/?president=2.

territories. There is significant third party evidence of this practice, which clearly demonstrates and manifests the exercise of effective control by Armenia.[40]

27. Accordingly, not only was the Republic of Armenia's role as the aggressor clear but the level of its continuing control over Nagorno-Karabakh and other occupied territories of the Republic of Azerbaijan is significant, and these actions entail State responsibility under international law. To these legal issues, we now turn.

C. The applicable law

28. A key preliminary question is that of the applicable law. As has been seen above, until the moment of Azerbaijan's independence the relevant law in relation to the status of territorial areas was the constitutional law of the USSR. At the moment of independence, the position with regard to the USSR, as has been seen, was incontrovertible: Nagorno-Karabakh formed part of the Azerbaijan SSR. Any attempt to change this established legal position without the consent of the Azerbaijan SSR would constitute a violation of Soviet constitutional law. After independence, the applicable law insofar as Azerbaijan's territorial integrity (as protected through the transitional norm of *uti possidetis*) is concerned is that of international law. This is particularly so with regard to third States, such as Armenia.

29. The full range of international legal principles is thus applicable to the situation concerning the territories of Azerbaijan currently under the occupation of Armenia: that is, Nagorno-Karabakh and the surrounding territories seized during the armed conflict of the early 1990s. Such legal principles include those relating to the use of force; international humanitarian law; international human rights law and international responsibility.

30. However, in addition to the general application of public international law, both Azerbaijan and Armenia are member States of the Council of Europe[41] and High Contracting Parties to the European Convention on Human Rights.[42] The Convention thus constitutes *lex specialis* for these States insofar as human rights issues are concerned. This adds a further layer of applicable law, incorporating both rights and duties, with regard to Azerbaijan and Armenia. It also adds an additional dimension in the context of remedial action.

D. Armenia's responsibility

31. That Armenia bears international responsibility for the actions and omissions of itself and of subordinate forces for which it is liable under international law is self-evident and forms the cornerstone of this paper. Such responsibility is established both under general international law and, more particularly, with regard to the provisions of the European Convention on Human Rights.

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[40] See United States Committee for Refugees and Immigrants, World Refugee Survey 2002, Country Report on Armenia.

[41] Both Armenia and Azerbaijan acceded to the Council of Europe on 25 January 2001; see www.coe.int/aboutCoe/index.asp?page=47paysleurope&l=en.

[42] Armenia ratified the Convention on 26 April 2002 and Azerbaijan on 15 April 2002.

1. Under general international law

32. The key provisions of international responsibility are laid down in the articles on State responsibility adopted by the United Nations International Law Commission ("ILC") on 9 August 2001[43] and commended to States by the General Assembly on 12 December 2001.[44] Article 1 declares that: "Every internationally wrongful act of a State entails the international responsibility of that State", while article 2 provides that:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State".[45]

33. Article 4 (1) addresses the question of the attribution of conduct to a State, something of particular importance for the purposes of this opinion. This provision declares that:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".

34. This principle, which is one of long standing in international law,[46] was underlined by the International Court in the *LaGrand* case declaring that: "the international responsibility of a state is engaged by the action of the competent organ and authorities of the state, whatever they may be"[47] and reiterated in the *Genocide Convention* case, where it was noted that it was:

> "One of the cornerstones of the law of state responsibility, that the conduct of any state organ is to be considered an act of the state under international law, and therefore gives rise to the responsibility of the state if it constitutes a breach of an obligation of the state".[48]

35. The ILC commentary to the articles on State responsibility underlined the broad nature of this principle and emphasized that the reference to State organs in this provision:

> "Is not limited to the organs of central government, to officials at high level or to persons with responsibility for the external relations of the state. It extends to organs of government of whatever kind or classification, exercising

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[43] United Nations document A/56/10, 2001. See also James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, 2002, and James Crawford, Alain Pellet, Simon Olleson (eds.), *The Law of International Responsibility*, Oxford, 2010.

[44] United Nations General Assembly resolution 56/83. See also General Assembly resolutions 59/35 and 62/61 and document A/62/62.

[45] See e.g. the *Chorzow Factory* case, PCIJ, series A, No. 9, p. 21 and the *Rainbow Warrior* case, 82 ILR, p. 499.

[46] See e.g. the *Moses* case, John B. Moore, *International Arbitration*, vol. III, pp. 3127, 3129 (1871).

[47] Provisional Measures, ICJ Reports, 1999, pp. 9, 16.

[48] ICJ Reports, 2007, para. 385. It was held that this principle constituted a rule of customary international law, ibid. See also *Immunity from Legal Process of a Special Rapporteur*, ICJ Reports, 1999, pp. 62, 87.

> whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level".[49]

36. Similarly, article 5 provides that the conduct of a person or entity which is not an organ of the State under article 4, but which is empowered by the law of the State to exercise elements of governmental authority shall be considered as an act of the State under international law, provided that the person or entity in question was acting in that capacity in the instance in question. Accordingly, activities by armed units of the State, including those empowered so to act, will engage the responsibility of the State. Thus Armenia is responsible internationally for actions (and omissions) of its armed forces in their activities in Azerbaijan.

37. A key element of State responsibility, and one particularly significant for present purposes, is the rule enshrined in article 8 that:

> "The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct".

38. This provision essentially covers two situations: first, where persons act directly under the instructions of State authorities and, secondly, where persons are acting under the "direction or control". The latter point is critical. It means that States cannot avoid responsibility for the acts of secessionist entities where in truth it is the State which is controlling the activities of the body in question. The difference between the two situations enumerated in article 8 is the level of control exercised. In the former case, the persons concerned are in effect part of the apparatus of the State insofar the particular situation is concerned. In the latter case, the power of the State is rather more diffuse.

39. The International Court addressed the matter in the *Nicaragua* case, where it was noted that in order for the State to be responsible for the activities, it would need to be demonstrated that the State "had effective control of the military or paramilitary operation in the course of which the alleged violations were committed".[50] This approach was reaffirmed in the *Genocide Convention* case.[51]

2. Under the European Convention on Human Rights

40. As noted above, both Armenia and Azerbaijan are contracting parties to this Convention, which further constitutes *lex specialis*. Jurisdictional rules, that is those concerning State responsibility are not the same as those that apply in general international law. The European Court of Human Rights has made it clear that a contracting party's responsibility covers not only the acts of its own agents and officials but extends on the basis of "effective overall control" to include acts of a "local administration" which survives by virtue of its support.[52]

41. The rationale behind this was explained by "the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings" and by the mission of the Court, as set out in

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[49] See Crawford, op.cit., p. 95.
[50] ICJ Reports, 1986, pp. 14, 64-5.
[51] ICJ Reports, 2007, at para. 398 and following.
[52] ECHR Judgement of 10 May 2001 at para. 77.

article 19 of the Convention, "to ensure the observance of the engagements undertaken by the High Contracting Parties". Accordingly, where a Government was unable to exercise its Convention obligations due to being ousted in fact from control, the Court concluded that any other finding would result in a "regrettable vacuum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court".[53]

42. The European Court of Human Rights further clarified this approach, noting in particular that:

> "According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action — whether lawful or unlawful — it exercises in practice effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration".[54]

43. The Court emphasized that it was not necessary for "detailed control" to be demonstrated, as "overall control" would suffice, while in addition, the responsibility of the State in question could be engaged by the acquiescence or connivance of the authorities of the State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction and that this was "particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognized by the international community".[55] It was also noted that under the Convention, a State's authorities were strictly liable for the conduct of their subordinates and consequently under a duty to impose their will. They could not shelter behind their inability to ensure that it was respected.[56]

44. Thus, the State in question is responsible not only for its own activities, but for those of a "subordinate local administration *which survives there by virtue of its military and other support*".[57] Whether such is the case is a matter of fact. The Court regarded a State's responsibility to be engaged in respect of unlawful acts committed by a separatist regime in part of the territory of another member State in the light of military and political support given to help set up that separatist regime.[58]

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[53] Ibid., para. 78.

[54] ECHR Judgement of 8 July 2004 at para. 314. See also ECHR Judgement of 23 February 1995 at para. 62 and ECHR Judgement of 28 November 1996 at para. 52; ECHR Judgement of 12 December 2001 at para. 66 and following; and ECHR Judgement of 29 March 2010 at para. 62 and following.

[55] ECHR Judgement of 8 July 2004 at para. 318.

[56] Ibid., paras. 314-9. See also ECHR Judgement of 16 November 2004, para. 65 and following, especially para. 69, and ECHR Judgement of 18 January 1978, series A No. 25, at para. 159. See also article 7 of the International Law Commission's Articles on State Responsibility and the *Cairo* case heard by the General Claims Commission, (1929) Reports of International Arbitral Awards 5 (RIAA), p. 516.

[57] ECHR Judgement of 8 July 2004 at para. 316.

[58] Ibid., para. 382.

45. Accordingly, the conclusion must be that due to its initial and continuing aggression against Azerbaijan and persisting occupation of this State's internationally recognized territory accomplished both directly through its own organs, agents and officials and indirectly through local Armenian forces and the subordinate local administration in the occupied Nagorno-Karabakh over which the Republic of Armenia exercises the requisite degree of effective control as it is understood under international law and the European Convention on Human Rights system, the Republic of Armenia bears full international responsibility for the breaches of international law that have occurred and continue to occur.

46. We turn now to the substantive breaches of international law for which Armenia is liable.

II. The forcible displacement[59] of the citizens of the Republic of Azerbaijan from the occupied territories

47. The rights of the citizens of the Republic of Azerbaijan have been violated by their expulsion from the occupied areas of Azerbaijan (Nagorno-Karabakh and surrounding areas) by the armed forces of Armenia or by subordinate forces for which it is internationally responsible. These rights flow from international law. It is, however, to be noted that article 3 (1) of Protocol No. 4 to the European Convention on Human Rights, 1963, provides that "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national." Although both Armenia and Azerbaijan are parties to this Protocol, this is dated from the date of accession[60] and the expulsions in question predate the coming into force of the Convention for the two States. The act of expulsion or deportation itself constitutes an instantaneous act and thus outside of the jurisdiction of the European Court. Nevertheless, the existence of the obligation for Armenia as from the date of its accession to the Convention reinforces the prohibition of the expulsions under general international law. The continuing consequences of the refusal to permit the return of expellees are examined below.[61]

48. The fact that all Azerbaijanis were expelled from the occupied territories is well attested. In a number of resolutions adopted in 1993 specifically concerning the conflict between Armenia and Azerbaijan over Nagorno-Karabakh, the Security Council of the United Nations expressed grave concern at "the displacement of a large number of civilians".[62] In its resolution of 20 December 1993, the General Assembly of the United Nations noted with alarm "that the number of refugees and displaced persons in Azerbaijan has recently exceeded one million".[63]

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[59] This term is explained below together with its relationship to the concepts of deportation and transfer, see para. 64 and following.

[60] In Armenia's case from 26 April 2002 and for Azerbaijan from 15 April 2002.

[61] See below, para. 117 and following.

[62] See United Nations Security Council resolutions 822 (1993), 853 (1993), 874 (1993) and 884 (1993).

[63] United Nations General Assembly resolution 48/114, entitled "Emergency international assistance to refugees and displaced persons in Azerbaijan".

49. The Representative of the United Nations Secretary-General concluded that "internal displacement in Azerbaijan is a direct consequence of the conflict over the territory of Nagorno-Karabakh".[64]

50. Beehner has written that:

> "In 1992, full-scale war between Azerbaijan and Armenia broke out. By the middle of the year, Armenia controlled the bulk of Nagorno-Karabakh and pushed further into Azerbaijani territory to establish the so-called Lachin Corridor, an umbilical cord linking the breakaway republic with Armenia proper. By 1993, Armenian forces had occupied nearly 20 percent of the Azerbaijani territory surrounding Nagorno-Karabakh and expelled hundreds of thousands of ethnic Azeris".[65]

51. The International Crisis Group underlined that:

> "Before the war the 424,900 inhabitants of those districts were almost exclusively Azeris, none of whom remain. Towns like Agdam (28,200), Kelbajar (8,100), Jebrail (6,200) and Fizuli (23,000) have been systematically levelled so that only foundations remain. Even electrical wiring, pipes, and other infrastructure have been sold as scrap".[66]

52. International law deals with questions of expulsions or deportations in the framework of the laws of armed conflict (or international humanitarian law). There are clear provisions, buttressed in recent years by case law.

53. Of overwhelming importance, article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 ("Geneva Convention IV")[67] provides in its first paragraph that:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive".

54. This was not, however, the first reference to deportation. Indeed, it may well be possible to trace the origins in positive law to the United States Lieber Code of 1863, article 23 of which provided that, under the civilized norms of warfare, "[p]rivate citizens are no longer murdered, enslaved, or carried off to distant

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[64] United Nations document E/CN.4/1999/79/Add.1, para. 20. See also para. 30. The Representative of the Secretary-General on the human rights of internally displaced persons stated in his report dated 15 April 2008, that 686,585 persons from Nagorno-Karabakh and seven adjacent regions were registered as displaced, "one of the highest proportions of displaced persons in the world", United Nations document A/HRC/8/6/Add.2, para. 7. It may also be added that it was concluded that: "Given the magnitude of the problem of forced displacement in Azerbaijan the Representative was impressed by the Government's achievements, which compare very favourably with national responses in many other countries affected by internal displacement", para. 61.

[65] "Nagorno-Karabakh: The Crisis in the Caucasus", 2005, Council for Foreign Relations, www.cfr.org/publication/9148/nagornokarabakh.html.

[66] International Crisis Group Report of 14 September 2005, op. cit., p. 7. See also International Crisis Group, "Tackling Azerbaijan's IDP Burden", Policy Briefing No. 67, 27 February 2012, p. 3.

[67] See Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949: IV Geneva Convention*, Geneva ICRC, 1958, p. 277.

parts".[68] There was no mention of deportations as such in the Hague Regulations of 1907, but in his authoritative *Commentary*, Pictet regarded the absence as being due to the fact that the practice had "fallen into abeyance".[69] However, the cumulative effect of a number of the provisions in the Regulations may be taken as being akin to the prohibition of deportation.[70]

55. Article 6 of the Charter of the International Military Tribunal (the Nuremberg Charter) refers to the phenomenon in two places. Article 6 (b) provides that war crimes include "deportation to slave labour or for any other purpose of civilian population of or in occupied territory", while article 6 (c) includes in the definition of crimes against humanity, "deportation, and other inhumane acts committed against any civilian population, before or during the war".[71] Article II of the 1945 Allied Control Council Law No. 10, 1945, was to the same effect.[72] Article 6 appeared as Principle VI (b) and (c) of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission.[73] Many of the judgements of the Tribunal underlined this.[74] Accordingly, it has been concluded that article 49 (1) simply reiterated existed customary law.[75]

56. It is also to be noted that article 53 provides that any destruction by the occupying power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered "absolutely necessary by military operations".

57. By virtue of article 147 of Geneva Convention IV and of article 85 (4) (a) of Additional Protocol I to the Geneva Conventions 1977, such deportations constitute a "grave breach" of the Convention. Further, article 22 (2) (a) of the 1991 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind stipulates that the "deportation or transfer of the civilian population" is regarded as an "exceptionally serious war crime".[76] This provision was relevant in the war crimes instruments that shortly followed.

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[68] Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, issued as General Order No. 100 (1863), see e.g. Theodor Meron, "The Humanization of Humanitarian Law", 94 American Journal of International Law, 2000, pp. 239, 245, noting that article 23 of the Lieber Code "anticipat[ed] the prohibition on deportations in the Fourth Geneva Convention".

[69] Op. cit., p. 279. See also Georg Schwarzenberger, *International Law As Applied by International Courts and Tribunals: The Law of Armed Conflict*, London, 1968, p. 227.

[70] See e.g. articles 42 to 56 of the Regulations.

[71] 82 UNTS 279, 39 AJIL Supp. 258 (1945). See also Jean-Marie Henckaerts, *Mass Expulsions in Modern International Law and Practice*, The Hague, Nijhoff, 1995, p. 154; and Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, p. 160.

[72] See also article 5 (c) of the 1946 IMT Charter (Tokyo), which established individual responsibility for crimes against humanity, including "deportation, and other inhumane acts committed against any civilian population, before or during the war".

[73] United Nations document A/1316, 1950.

[74] See e.g. *United States v. Milch*, 2 *Trials of War Criminals Before the Nuremberg Military Tribunals*, 1946-49, pp. 353, 790. See also Alfred de Zayas, "International Law and Mass Population Transfers", 16 Harvard International Law Journal, 1975, pp. 207, 217 and following.

[75] Ibid., p. 210.

[76] United Nations document A/46/10, 1991, article 22 (2) (a).

58. Under article 2 (g) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, the power of the Tribunal includes the prosecution of persons for the unlawful deportation or transfer of civilians as a grave breach of the 1949 Geneva Convention IV,[77] while article 5 (d) provides that deportation, when committed against any civilian population, constitutes a crime against humanity. Article 3 (d) of the Statute of the International Criminal Tribunal for Rwanda, 1994, declares that deportation committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds constitutes a crime against humanity.[78]

59. The Statute of the International Criminal Court, 1998 ("the Rome Statute"),[79] also enshrines the prohibition of deportation. Article 7 (1) (d) provides that "[d]eportation or forcible transfer of the population" when committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack", constitutes a crime against humanity. Article 8 (2) (a) (vii) declares that "[u]nlawful deportation or transfer" constitutes a war crime in international armed conflicts, while article 8 (2) (b) (viii) states that "the deportation or transfer [by the Occupying Power] of all or parts of the population of the occupied territory within or outside [the territory it occupies]", constitutes a war crime in international armed conflicts and article 8 (2) (e) (viii) holds that "[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand", constitutes a war crime in non-international armed conflict.

60. The Elements of Crimes adopted by the States parties to the Rome Statute,[80] which forms part of the applicable law for the International Criminal Court,[81] with regard to article 7 (1) (d) requires that:

> "1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
>
> 2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
>
> 3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
>
> 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

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[77] United Nations Security Council resolution 827 (1993), as amended by resolutions 1166 (1998) and 1329 (2000).

[78] United Nations Security Council resolution 955 (1994), as amended by resolutions 1165 (1998) and 1329 (2000).

[79] Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 July 1998, United Nations document A/CONF.183/9.

[80] CC-ASP/1/3 (part II-B) adopted on 9 September 2002. Under article 9 (1) of the Statute the Elements of Crimes "shall assist the Court in the interpretation and application of articles 6, 7 and 8" and are to be adopted by a two-thirds majority of the members of the Assembly of States Parties.

[81] See article 21 of the Statute.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[82]

61. The Elements of Crimes with regard to article 8 (2) (a) (vii) are the following:

"1. The perpetrator deported or transferred one or more persons to another State or to another location.

2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

3. The perpetrator was aware of the factual circumstances that established that protected status.

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

62. The relevant provisions in the Elements of Crimes with regard to article 8 (2) (b) (viii) requires that:

"1. The perpetrator: ...

(b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.

2. The conduct took place in the context of and was associated with an international armed conflict.

3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

63. It is thus clear that the prohibition of deportation is established in both conventional and customary international law and is thus binding upon the Republic of Armenia.

64. Recent case law has also clarified the meaning of deportation. For example, the issue as to whether the deportation needs to be accomplished by force in order to fall within the prohibition has been debated, but the provisions of the Rome Statute cited above are clear at least as to the law to be applied by the International Criminal Court. The broad definition of "force" in this framework is particularly to be noted.[83] Further, the International Court of Justice has referred to the "forcible transfer of populations and deportations, which are prohibited under article 49, paragraph 1 [of Geneva Convention IV]".[84] In the *Blaskic* case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") declared that, "The deportation or forcible transfer of civilians means 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which

[82] The term "forcibly" was defined in a footnote as "not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment", while it was noted in a footnote that "deported or forcibly transferred" was interchangeable with "forcibly displaced".

[83] See previous footnote.

[84] ICJ Reports, 2004, pp. 136, 192.

they are lawfully present, without grounds permitted under international law'".[85] This has been underlined in a number of other cases.

65. One distinction that has been made is that deportation involves expulsion across a national border whereas forced transfer involves the displacement of people from one area of a State to another area, which may take place within the same national borders.[86] The Trial Chamber in the *Krstic* case defined both deportation and forcible transfer as "the involuntary and unlawful evacuation of individuals from the territory in which they reside".[87] Indeed, the provisions of the Rome Statute follow this approach as article 8 (2) (b) (viii) refers clearly to the "deportation or transfer of all or parts of the population of the occupied territory within or outside this territory".

66. In the view of the Appeals Chamber in the *Stakić* case, the crime of deportation required the displacement of individuals across a border. It was noted that the default principle under customary international law with respect to the nature of the border is that there must be expulsion across a de jure border to another country, as in article 49 of Geneva Convention IV. However, customary international law also recognized that displacement from "occupied territory", as expressly set out in article 49 of Geneva Convention IV and as recognized by numerous Security Council resolutions, was also sufficient to amount to deportation. The Appeals Chamber also accepted that under certain circumstances displacement across a de facto border may be sufficient to amount to deportation.[88]

67. The issue was discussed in the *Milutinovic* case by the ICTY Trial Chamber judgement of 26 February 2009.[89] Bypassing the, for present purposes semantic, dispute over deportation and forcible transfer by referring to forcible displacement as encompassing both phenomena, the Chamber noted that:

> "The *actus reus* of forcible displacement is (a) the displacement of persons by expulsion or other coercive acts, (b) from an area in which they are lawfully present, (c) without grounds permitted under international law. The *mens rea* for the offence is the intent to displace, permanently or otherwise, the victims within the relevant national border (as in forcible transfer) or across the relevant national border (as in deportation)".[90]

68. In an important and very relevant statement of principle, the Trial Chamber declared that:

> "An essential element is the involuntary nature of the displacement. Trial and Appeals Chambers have consistently held that it is the absence of 'genuine choice' that makes a given act of displacement unlawful. In this context, the Appeals Chamber has held that genuine choice cannot be inferred from the fact that consent was expressed where the circumstances deprive the consent of any value. In addition, Trial and Appeals Chambers have inferred a lack of genuine choice from threatening and intimidating acts that are calculated to deprive the

[85] Case No. IT-95-14, 2000, at para. 234 and 122 International Law Reports, pp. 1, 88.
[86] See e.g. *Simic*, IT-95-9-PT, 2003, para. 122; *Naletilic & Martinovic*, IT-98-34-T, 2003, para. 670; and *Krnojelac*, IT-97-25-T, 2002, paras. 474 & 476.
[87] IT-98-33-T, 2001, para. 521.
[88] *Stakić* Appeal Judgement, IT-97-24-A, 2006, para. 300.
[89] IT-05-87-T, 2009.
[90] Ibid., para. 164 (footnotes omitted).

civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of or the threat to commit other crimes 'calculated to terrify the population and make them flee the area with no hope of return'".[91]

69. What needs to be emphasized is that the prohibition does not require the intention permanently to displace the people in question from their homes.[92] But only that they must be intentionally displaced.[93] As to whose intention is required, it has been stated that the intent to displace the victims may be that of "either the physical perpetrator or the planner, orderer, or instigator of the physical perpetrator's conduct, or a member of the joint criminal enterprise".[94] This is particularly important in cases such as the occupied territories of Azerbaijan where the State responsible seeks to deny responsibility.

70. While it is true that the second paragraph of article 49 of Geneva Convention IV provides that "the Occupying Power may undertake total or partial evacuation of a given area is the security of the population or imperative military reasons so demand", such action:

> "May not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased".[95]

71. The Chamber in *Milutinovic* addressed this issue and concluded that:

> "The chief distinction between an illegitimate forcible displacement and a permissible evacuation is that, in the case of the latter, 'persons thus evacuated [are] transferred back to their homes as soon as the hostilities in the area in question have ceased.' It is therefore unlawful to use evacuation measures as a pretext to forcibly dislocate a population and seize control over a territory".[96]

72. The Security Council of the United Nations in a range of resolutions has condemned the forcible displacement of persons,[97] while in resolution 1674 (2006) on the protection of civilians in armed conflict, the Council expressly recalled "the prohibition of the forcible displacement of civilians in situations of armed conflict under circumstances that are in violation of parties' obligations under international humanitarian law". The General Assembly of the United Nations has also adopted numerous resolutions to the same effect covering a wide range of situations.

73. Further in recommendation 1198 adopted in 1992 on the crisis in the Former Yugoslavia, the Parliamentary Assembly of the Council of Europe considered that the expulsion of civilians was a crime against humanity and that persons responsible for such crimes should be held personally accountable.

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[91] Ibid., para. 165 (footnotes omitted).

[92] See *Stakić* Appeal Judgement, IT-97-24-A, 2006, paras. 307, 317.

[93] *Milutinovic*, para. 167.

[94] Ibid.

[95] Note that by the third paragraph of article 49, the occupying Power must ensure that the evacuation is carried out in satisfactory conditions of safety, health, nutrition and accommodation.

[96] Op. cit., para. 166 (footnotes omitted). See also *Blagojević* Trial Judgement, para. 597.

[97] See e.g. resolutions 752 (1992); 819 (1993); 1019 (1995); 1034 (1995).

74. Accordingly, it may be concluded that Armenia's actions, whether by its own forces or by those forces for whom it bears responsibility, in precipitating and maintaining the forcible displacement (or expulsion or deportation or forcible transfer) of the Azerbaijani population of Nagorno-Karabakh and other occupied territories is consistent with the international law offence as described above. The intention to displace was manifestly evidenced by the expulsions themselves coupled with the restriction of such deportations to those of Azerbaijani ethnicity and the refusal to countenance the return of the displaced persons.

75. Indeed, Armenia's actions may be characterized as "ethnic cleansing", a term defined by the International Court of Justice as: "in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area'".[98]

III. The violation of the principle of non-discrimination in regard to Azerbaijani internally displaced persons, including the implantation of ethnic Armenian settlers in the occupied territories of Azerbaijan

A. Discrimination by forcible displacement of ethnic Azerbaijanis

76. The rights of the internally displaced Azerbaijani persons to non-discriminatory treatment have been violated by Armenia and those for whom Armenia is internationally responsible.

77. The principle of non-discrimination is well established in international law, appearing in a number of international treaties.[99] It is also fair to conclude that discrimination on racial grounds is also contrary to customary international law.[100] This conclusion may be reached on the basis inter alia of Articles 55 and 56 of the Charter of the United Nations, articles 2 and 7 of the Universal Declaration of Human Rights, the International Covenants on Human Rights, regional instruments

[98] *Genocide Convention*, ICJ Reports, 2007, para. 190. See also United Nations document S/35374 (1993), para. 55.

[99] See e.g. the International Convention on the Elimination of All Forms of Racial Discrimination, 1965; the International Covenants on Human Rights, 1966; and the International Convention on the Elimination of All Forms of Discrimination against Women, 1979. See also e.g. Javaid Rehman, *International Human Rights Law*, second ed., 2010, London, chapter 12; Wouter Vandenhole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Antwerp, 2005; Anne Bayefsky, "The Principle of Equality or Non-discrimination in International Law", 11 Human Rights Law Journal, 1990, p. 1; Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, and Theodor Meron, *Human Rights Law-Making in the United Nations*, Oxford, 1986, chapters 1-3.

[100] See e.g. the Dissenting Opinion of Judge Tanaka in the *South-West Africa* cases, ICJ Reports, 1966, pp. 3, 293.

on human rights protection and general State practice. Discrimination on grounds of religion is also contrary to customary international law.[101]

78. The same principle appears in international humanitarian law. The prohibition of discrimination appears clearly in common article 3 (1) of the four Geneva Conventions, 1949, with regard to non-international armed conflicts in the following form:

> "(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria".

79. In the case of international armed conflict, article 13 of Geneva Convention IV provides that the provisions of the Convention concerning protection of populations "cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war".[102] The International Committee of the Red Cross ("ICRC") in its work on customary international humanitarian law regarded this prohibition of discrimination as established by State practice as a rule of customary international law with regard to both international and non-international armed conflicts.[103]

80. In particular, as the United Kingdom *The Manual of the Law of Armed Conflict* puts it:

> "It is prohibited to move them [civilians] for reasons based on race, colour, religion or faith, sex, birth, or wealth, or any similar criteria or in order to shield military targets from attack".[104]

81. The prohibition of discrimination appears also in article 14 of the European Convention on Human Rights, which provides that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

82. The test of discrimination is the absence of any "objective and reasonable justification", for the distinction, that is, where the difference does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality

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[101] See e.g. the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981, United Nations General Assembly resolution 36/55. See Odio Benito, *Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief*, New York, 1989, and Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, Dordrecht, 1995. The United Nations Human Rights Committee produced a general comment on article 18 concerning freedom of thought, conscience and religion, see general comment No. 22, 1993, HRI/GEN/1/Rev.1, 1994.

[102] This is also regarded as a fundamental guarantee in article 75 (1) of Additional Protocol I and article 4 (1) of Additional Protocol II of 1977. See also United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, pp. 395-6.

[103] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge, ICRC, 2005, vol. I: Rules, p. 308 and following (Rule 88).

[104] Op. cit., p. 390.

between the means employed and the aim sought to be realised".[105] Further, the Court has declared that "very weighty reasons" are required in order to justify a difference in treatment on the ground of nationality.[106]

83. Article 14 of the Convention is not a freestanding right and is only applicable in conjunction with other articles of the Convention. The established facts merely need to fall within the scope of one or more Convention rights.[107]

84. It is clear that due to Armenian military operations and occupation of Azerbaijani territories, ethnic Azerbaijanis were forced to leave their homes and possessions in these territories and permission to return is refused. Ethnic Armenians do not suffer the same treatment from the Armenian authorities and forces, thus precipitating a violation of article 14 of the Convention. The military action taken by Armenia and those for whom it bears international responsibility on the territory of Azerbaijan had the aim of creating a mono-ethnic culture there, both by expelling the indigenous ethnic Azerbaijani population and by refusing to permit their return.[108] Human Rights Watch, in particular, concluded that:

> "The Azeri civilian population was expelled from all areas captured by Karabakh Armenian forces. Azeri civilians caught by advancing Karabakh Armenian forces during their offensives of 1993 were taken hostage, and many Azeris were killed by indiscriminate fire as they attempted to escape".[109]

85. In the 2004 report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe concerning the conflict the situation was described as follows:

> **"More than a decade after the armed hostilities started, the conflict over the Nagorno-Karabakh region remains unsolved. Hundreds of thousands of people are still displaced and live in miserable conditions. Considerable parts of the territory of Azerbaijan are still occupied by Armenian forces. The military action, and the widespread ethnic hostilities which preceded it, led to the large-scale ethnic expulsion and the creation of mono-ethnic areas which resemble the terrible concept of ethnic cleansing."**[110]

86. On the basis of this report the Parliamentary Assembly of the Council of Europe adopted resolution 1416 in which:

> "[T]he Assembly expresses its concern that the military action, and the widespread ethnic hostilities which preceded it, led to large-scale ethnic

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[105] See e.g. ECHR Judgement of 16 September 1996, para. 42.

[106] Ibid.

[107] See ECHR Judgement of 23 July 1968, series A No. 6, pp. 33-34, para. 9. See also ECHR Judgement of 27 October 1975, para. 45; ECHR Judgement of 28 November 1984, para. 29; ECHR Judgement of 16 September 1996, para. 36; and ECHR Judgement of 27 March 1998, para. 28.

[108] See International Crisis Group Report of 14 September 2005, op. cit., para. 2 of the executive summary.

[109] Human Rights Watch Report, 1994, op. cit., p. VIII.

[110] Report of the Political Affairs Committee to the Parliamentary Assembly of the Council of Europe, document 10364 of 29 November 2004, para. 1 of the summary.

expulsion and the creation of mono-ethnic areas which resemble the terrible concept of ethnic cleansing".[111]

87. The discriminatory displacement from the occupied territories of Azerbaijan is reflected by the demographic changes. According to the International Crisis Group[112] and the Directorate General of Political Affairs of the Council of Europe,[113] there are "virtually no Azeris left" in Nagorno-Karabakh. The United States Committee for Refugees and Immigrants stated in its country report on Azerbaijan that:

> **"Because Armenian forces continue to control Nagorno-Karabakh and six surrounding provinces that make up about 20 percent of Azerbaijan's territory, the vast majority of the displaced [Azerbaijanis] cannot return to their home regions."**[114]

B. Discrimination by implantation of ethnic Armenian settlers in the occupied territories of Azerbaijan

88. Article 49, paragraph 6 of Geneva Convention IV provides that "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". This is regarded as a "grave breach" pursuant to article 85 (4) (a) of Additional Protocol I, 1977, and as a war crime in article 8 (2) (b) (viii) of the Rome Statute.[115] The International Court of Justice in the *Wall* case, regarded this provision as prohibiting "not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an Occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory".[116] The ICRC study on customary international humanitarian law regards this provision as constituting a rule of customary international law applicable in international armed conflicts.[117]

89. The Armenian policy for implanting ethnic Armenian settlers in the occupied territories has proceeded apace. Various incentives are provided for Armenians to

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[111] Resolution 1416 of the Parliamentary Assembly of the Council of Europe, adopted on 25 January 2005, para. 2. It is to be noted that in a speech made at the diplomatic academy in Moscow in 2003, the then President of Armenia, Robert Kocharian, was reported as saying that there was an "ethnic incompatibility" between Armenians and Azerbaijanis, see the press article by Artur Terian published on 16 January 2003, www.armenialiberty.org. This comment provoked Peter Schieder, the then President of the Parliamentary Assembly of the Council of Europe, to declare that "since its creation the Council of Europe has never heard the phrase 'ethnic incompatibility'", cited in a letter from the Permanent Representative of Azerbaijan to the United Nations, United Nations document A/64/475-S/2009/508, 6 October 2009. See also reference made to Armenian ethnic distinctiveness on the basis of genetic studies, letter from the Permanent Representative of Azerbaijan to the United Nations, United Nations document A/65/534-S/2010/547, 22 October 2010.

[112] International Crisis Group Report of 14 September 2005, op. cit., p. 4.

[113] Appendix IV to the report of the Political Affairs Committee to the Parliamentary Assembly of the Council of Europe, op. cit, p. 2.

[114] World Refugee Survey 2001, country report on Azerbaijan.

[115] See Dinstein, op. cit., p. 238 and following; and Henckaerts, op. cit., p. 148 and following.

[116] ICJ Reports, 2004, pp. 136, 183. See also United Nations Security Council resolutions 446 (1979); 452 (1979); 465 (1980); 476 (1980); 677 (1990) and 752 (1992).

[117] Henckaerts and Doswald-Beck, op. cit., p. 462.

settle in the territory in question, such as "free housing, social infrastructure, inexpensive or free utilities, low taxes, money and livestock",[118] as well as tax exemptions, newly built houses, plots of land, advantageous loans.[119] In its report, the OSCE fact-finding mission ("FFM") in 2005 sought to analyse the situation of settlers in the occupied areas outside of Nagorno-Karabakh. It noted that "disparate settlement incentives traceable to the authorities within and between the various territories" existed,[120] and concluded that:

> "Settlement figures for the areas discussed in this report, whose populations the FFM has interviewed, counted or directly observed, are as follows: in Kelbajar District approximately 1,500; in Agdam District from 800 to 1,000; in Fizuli District under 10; in Jebrail District under 100; in Zangelan District from 700 to 1,000; and in Kubatly District from 1,000 to 1,500. Thus, the FFM's conclusions on the number of settlers do not precisely correspond with population figures provided by the local authorities, which were higher".[121]

90. In 2010, the OSCE Minsk Group Co-Chairs, joined by the OSCE and United Nations High Commissioner for Refugees (UNHCR) officials, conducted a field assessment mission in the occupied territories of Azerbaijan. It concluded that about 14,000 Armenian settlers have replaced the more than half a million Azerbaijanis forced to leave.[122]

91. The picture is particularly clear with regard to Lachin, an occupied area between Nagorno-Karabakh and Armenia itself. For example, the United States Committee for Refugees and Immigrants in its World Refugee Survey 2002 country report on Armenia stated that:

> "Government officials in Armenia have reported that about 1,000 settler families from Armenia reside in Nagorno-Karabakh and the Lachin Corridor, a strip of land that separates Nagorno-Karabakh from Armenia.... Settlers choosing to reside in and around Nagorno-Karabakh reportedly receive the equivalent of $365 and a house from the de facto authorities".[123]

92. In a paper prepared by Anna Matveeva on "Minorities in the South Caucasus" for the ninth session (May 2003) of the Working Group on Minorities of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, the following was stated:

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[118] International Crisis Group Report of 14 September 2005, op. cit., p. 7.

[119] Ibid. See also United Nations document A/59/568, letter from the Permanent Representative of Azerbaijan to the United Nations dated 11 November 2004 including annex with enclosure, pp. 7-12.

[120] Report of the OSCE fact-finding mission to the occupied territories of Azerbaijan surrounding Nagorno-Karabakh, 28 February 2005, United Nations document A/59/747-S/2005/187, p. 35.

[121] Ibid., p. 33.

[122] Report of the OSCE Minsk Group Co-Chairs' field assessment mission to the occupied territories of Azerbaijan surrounding Nagorno-Karabakh, executive summary, 31 March 2011. See also International Crisis Group policy briefing of 27 February 2012, op. cit, p. 3, and United Nations document A/65/801-S/2011/208, letter from the Permanent Representative of Azerbaijan to the United Nations dated 29 March 2011.

[123] http://refugees.org/countryreports.aspx?__VIEWSTATE=dDwxMTA1OTA4MTYwOzts PENvdW50cnlERDpHb0J1dHRvbjs%2BPrImhOOqDI29eBMz8b04PTi8xjW2&cid=312&subm=&ssm=&map=&_ctl0%3ASearchInput=+KEYWORD+SEARCH&CountryDD%3ALocationList.

"A policy of resettlement in areas held by the Armenian forces around Karabakh ('occupied territories' or 'security zone') which enjoy relative security has been conducted since 1990s. Applications for settlement are approved by the governor of Lachin who tends to mainly accept families. Settlers normally receive state support in renovation of houses, do not pay taxes and much reduced rates for utilities, while the authorities try to build physical and social infrastructure. At present, the numbers are small — between 20,000 to 28,000, according to local authorities. However, if this process continues (and the expectation is that Armenian labour migrants who will be returning from Russia, will be encouraged to go there), Israel-type scenario can be easily envisaged and it would be even more difficult to reach a 'peace for territories' settlement".[124]

93. This is supported by the International Crisis Group, which reported that:

"Stepanakert considers Lachin for all intents and purposes part of Nagorno-Karabakh. Its demographic structure has been modified. Before the war, 47,400 Azeris and Kurds lived there: today its population is some 10,000 Armenians, according to Nagorno-Karabakh officials. The incentives offered to settlers include free housing, social infrastructure, inexpensive or free utilities, low taxes, money and livestock. In the town centre, up to 85 percent of the houses have been reconstructed and re-distributed. New power lines, road connections and other infrastructure have made the district more dependent upon Armenia and Nagorno-Karabakh than before the war".[125]

94. The conclusion is, therefore, clear. Despite efforts made by the international community generally to condemn and discourage settlement of the occupied territories and to call for the prohibition of changing the demographic structure of the region,[126] such settlement has continued. Together with the forcible displacement of ethnic Azerbaijanis, the emplacement of ethnic Armenians in the occupied territories of Azerbaijan has, contrary to international law, altered the demographic balance in a discriminatory manner.

IV. The prevention of access of Azerbaijani internally displaced persons to their property in the occupied areas by Armenia and those for whom it is responsible

95. The rights of the internally displaced Azerbaijanis to their property and to access to such property have been violated by Armenia and by those for whom Armenia is responsible.

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[124] United Nations document E/CN.4/Sub.2/AC.5/2003/WP.7, 5 May 2003 at pp. 34-35.

[125] At p. 7, footnotes omitted. See also the International Crisis Group, "Nagorno-Karabakh: A Plan for Peace", Europe Report No. 167, 11 October 2005, at p. 22, footnotes omitted, and International Crisis Group Policy Briefing of 27 February 2012, op. cit., at p. 3. A full analysis of the settlement programme was presented by the Permanent Representative of Azerbaijan to the United Nations on 11 November 2004 and 27 April 2010, United Nations documents A/59/568 and A/64/760-S/2010/211.

[126] See e.g. Parliamentary Assembly of the Council of Europe Recommendations 1570 (2002) and 1497 (2006).

96. The ICRC in its work on customary international humanitarian law has noted that State practice has established the rule of respect for the property rights of displaced persons as a norm of customary international law applicable in both international and non-international armed conflicts.[127] The Guiding Principles on Internal Displacement, for example, provide that "property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use",[128] while the Agreement on Refugees and Displaced Persons annexed to the Dayton Accords states that "all refugees and displaced persons ... shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them".[129]

97. However, it is the provisions of the European Convention on Human Rights, which are of particular application for present purposes as a clear jurisprudence has developed on the matter. Article 1 of Protocol No. 1 to the Convention provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

98. The case law of the Court has established three rules contained in this article described as follows:

> "The first, which is expressed in the first sentence of the first paragraph (P1-1) and which is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph (P1-1), covers the deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph (P1-1), recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule."[130]

99. As the third rule is not of relevance in this case, a description of this rule in detail can be left aside. Insofar as the principle of peaceful enjoyment of possessions is concerned, it is established that the term "possessions" is to be flexibly interpreted to include not only the ownership of physical goods such as a plot of land and a house, but also "certain other rights and interests constituting assets" which have a certain economic value.[131] In addition, a person's legitimate

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[127] See Henckaerts and Doswald-Beck, op. cit., p. 472.

[128] See further on the Guiding Principles, below, para. 112.

[129] Article 1 (1) of annex 7 of the Dayton Peace Agreement documents initialled in Dayton, Ohio, on 21 November 1995 and signed in Paris on 14 December 1995, see www1.umn.edu/humanrts/icty_/dayton/daytonannex7.html.

[130] ECHR Judgement of 20 November 1995, para. 33. See also ECHR Judgement of 23 September 1982, para. 61; and ECHR Judgement of 9 December 1994, para. 56.

[131] ECHR Judgement of 29 June 2004, para. 138. The Court further noted that the applicants had unchallenged rights over the common lands in the village, such as pasture, grazing and forest, and that they earned their living from stockbreeding and tree-felling. All of these economic resources and the revenue that the applicants derived from them were held capable of qualifying as "possessions" for the purposes of article 1, ibid., para. 139.

expectation of being able to carry out a proposed development has to be regarded, for the purposes of article 1 of Protocol No. 1, as a component part of the property.[132] Thus, article 1 of Protocol No. 1 affords protection not only against an interference with the right to property taken as a whole (for example an expropriation), but also against interferences with the various constituent elements of that right, taken individually, for example, the right to dispose of one's property.[133]

100. In a number of cases, the Court has established that denial of access to a person's property constitutes a violation of the right to the peaceful enjoyment of possessions.[134]

101. The military action taken by Armenia and those for whom it bears international responsibility resulted in the forcible displacement of ethnic Azerbaijanis from the occupied territories. Since the Azerbaijanis were obliged to flee from their normal places of residence with immediate or almost immediate effect, there was little opportunity to take their property and belongings with them. Beside private buildings, houses and land plots, they also left behind their domestic animals (cows, sheep, chickens etc.) as well as other possessions (such as cars and furniture). It was also extremely difficult to retain or retrieve official documents.[135]

102. The enormous damage caused by the unlawful seizure of the sovereign territory of the Republic of Azerbaijan by Armenian forces has been described in some detail in the report of the Republic of Azerbaijan entitled "On results of Armenian aggression against Azerbaijan and recent developments in the occupied territories".[136] The Security Council of the United Nations has on a number of occasions expressed its deep concern at the situation in the occupied territory of Azerbaijan which resulted in the destruction of property.[137] Further, as the report of the International Crisis Group has emphasized:

> "Armenia is not willing to [...] allow the return of Azerbaijan internally displaced persons (IDPs) to Nagorno-Karabakh, until the independence of Nagorno-Karabakh is a reality."[138]

103. Thus, the Azerbaijani internally displaced persons have no access to their possessions to date and have lost all control over them. Consequently, their right to the peaceful enjoyment of their possessions guaranteed by article 1 of Protocol No. 1 has

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[132] See e.g. ECHR Judgement of 29 November 1991, para. 51.

[133] ECHR Judgement of 13 June 1979, para. 63.

[134] ECHR Judgement of 18 December 1996, para. 63. The principle was reaffirmed in subsequent cases, see e.g. ECHR Judgements of 10 May 2001, paras. 172, 187 and 189, and of 29 June 2004, para. 143.

[135] See e.g. International Crisis Group Report of 11 October 2005, op. cit., p. 27. See also International Crisis Group Report of 14 September 2005, op. cit., p. 24, and International Crisis Group Policy Briefing of 27 February 2012, op. cit, p. 3.

[136] Annex to the letter dated 12 November 2003 from the Permanent Representative of Azerbaijan to the United Nations, United Nations document A/58/594-S/2003/1090, 13 November 2003.

[137] See the statements made by the President of the United Nations Security Council on 12 May 1992, S/23904; 26 August 1992, S/24493; and 27 October 1992, S/24721. As to reports of damage, see also the report of the OSCE fact-finding mission to the occupied territories of Azerbaijan surrounding Nagorno-Karabakh, op. cit, and the report of the OSCE Minsk Group Co-Chairs' field assessment mission to the occupied territories of Azerbaijan surrounding Nagorno-Karabakh, executive summary, op. cit.

[138] International Crisis Group Report of 11 October 2005, op. cit., p. i.

been denied by Armenia and by those for whom Armenia bears international responsibility.

V. The right of return of Azerbaijani internally displaced persons to their homes in internationally recognized Azerbaijani territory

104. The rights of Azerbaijani internally displaced persons to return to their homes and to their property and possessions have been violated by Armenia and by those for whom Armenia is internationally responsible.

105. The ICRC commentary on customary international humanitarian law declares that, "displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist" and concludes that State practice has established this principle as a norm of customary international law in both international and non-international armed conflicts.[139]

106. The right of return of the internally displaced[140] flows from several distinct sources.

107. The first relevant source is international humanitarian law. Article 49, paragraph 2, of Geneva Convention IV provides that persons who have been evacuated must be transferred back to their homes as soon as hostilities in the area in question have ceased. This may be interpreted logically as extending to displacement, both voluntary and forcible. The test is the absence of fighting in the area in question and is thus a question of fact. It would certainly apply to most areas of the occupied territories of Azerbaijan, apart from arguably the area proximate to the Line of Contact (the ceasefire line under the Bishkek Protocol of 1994). It most certainly cannot be denied with regard to the area between the occupied Nagorno-Karabakh and Armenia, which is far from the ceasefire line (for example, Lachin).

108. Further, article 85 (4) (b) of Additional Protocol I declares as a grave breach of the Convention the unjustifiable delay in the repatriation of civilians when committed wilfully and in violation of the Geneva Conventions and the Protocol.[141]

109. The second relevant source is international human rights law. The Universal Declaration of Human Rights recognizes that "everybody has the right ... to return to his country",[142] while article 12 (4) of the International Covenant on Civil and Political Rights, 1966, declares that, "no-one shall be arbitrarily deprived of the right to enter his own country".[143] Since the persons concerned are Azerbaijani nationals and since the territories in question are internationally recognized as being part of Azerbaijan, the criteria are fulfilled. The internally displaced thus have the right not to be prevented from returning. It cannot be argued that this right is limited

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[139] Henckaerts and Doswald-Beck, op. cit., p. 468.

[140] This paper does not deal with the rights of refugees in international law.

[141] Armenia has been a party to Protocol I since 7 June 1993.

[142] Article 13 (2). The Declaration was adopted by the United Nations General Assembly in its resolution 217 A (III) of 10 December 1948.

[143] See also article 22 (5) of the Inter-American Convention on Human Rights, 1969, and article 12 (2) of the African Charter on Human and Peoples' Rights, 1981.

to particular areas of the country in question. It must apply to all parts of the country and in particular, therefore, to the place of permanent or habitual residence from which they were displaced illegally.

110. The third relevant source is regional human rights law and particularly the European Convention on Human Rights. Article 2 (1) of Protocol No. 4 provides that, "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence", while article 3 (2) provides that, "no-one shall be deprived of the right to enter the territory of the state of which he is a national". This Protocol binds both Armenia and Azerbaijan and is applicable since the deprivation of the right (unlike the original forcible displacement) is not an instantaneous act taking place before the instrument came into force for the parties, but is a continuing breach. Armenia is thus liable for this violation of the Convention.

111. Further, it is a necessary implication of article 8 of the Convention concerning the right to respect for private and family life and home and of article 1 of Protocol No. 1 concerning the right to peaceful enjoyment of possessions (see above section), that States parties to the Convention permit individuals to return to their homes from which they have been displaced in order to be able to exercise their rights.

112. Fourthly, there are a range of resolutions, recommendations and declarations, which while not necessarily binding in themselves, do point to the existence of State practice underlining the right of internally displaced persons to return to their homes. The Guiding Principles on Internal Displacement were presented by the Representative of the Secretary-General on internally displaced persons to the United Nations Commission on Human Rights in April 1998. Both the Commission and the General Assembly, in unanimously adopted resolutions, took note of the Principles, welcomed their use as an important tool and standard, and encouraged United Nations agencies, regional organizations and NGOs to disseminate and apply them.[144] In his 2005 report entitled "In larger freedom" the Secretary-General referred to the Principles as "the basic international norm for protection" of internally displaced persons,[145] while the Representative of the Secretary-General on the human rights of internally displaced persons noted in his final report dated 5 January 2010 that, "the Guiding Principles reflect and are consistent with international human rights and humanitarian law, restating existing norms and tailoring them to the needs of the displaced".[146] Indeed, the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, for example, obliges the 10 member States to incorporate the Guiding Principles into their domestic law.[147]

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[144] United Nations document E/CN.4/1998/53/Add.2, 11 February 1998. See also Catherine Phuong, *The International Protection of Internally Displaced Persons*, Cambridge, 2005, p. 56 and following; Simon Bagshaw, "Internally Displaced Persons at the Fifty-fourth Session of the UN Commission on Human Rights, 16 March-24 April 1998", 10 International Journal of Refugee Law, 1998, p. 548; and Walter Kälin, "Guiding Principles on Internal Displacement: Annotations", Studies on Transnational Legal Policy, No. 32. 2000.

[145] United Nations document A/59/2005, 21 March 2005, para. 210.

[146] A/HRC/13/21, 5 January 2010, para. 10.

[147] Ibid., para. 12.

113. Principle 28 of the Guiding Principles provides that:

> "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, to allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country".

114. Further relevant documents include the following instruments. Recommendation Rec (2006) 6 adopted by the Committee of Ministers of the Council of Europe on 5 April 2006, while supporting the United Nations guidelines, declares in paragraph 12 that, "Internally displaced persons have the right to return voluntarily, in safety and in dignity, to their homes or places of habitual residence, or to resettle in another part of the country in accordance with the European Convention on Human Rights".[148] Recommendation 1877 (2009) of the Parliamentary Assembly of the Council of Europe emphasizes that, "IDPs' right to return under international humanitarian law, as well as under the freedom of movement deriving from international and regional human rights law, must be unconditionally observed and ensured by all responsible authorities".[149] These statements of general principle have been supplemented by consideration of specific issues in the United Nations and regional intergovernmental organizations.

115. Specific instruments have also called for the return of internally displaced persons, such as the Panmunjon Armistice Agreement concerning Korea of 27 July 1953[150] and the Dayton Peace Accords of 14 December 1995.[151]

116. It may be concluded, therefore, that the weight and consistency of State practice provides that internally displaced persons should be permitted to their homes, particularly those areas where hostilities have ceased in effect. This would cover the bulk of the occupied territories. The relevant States must facilitate this opportunity, where it is the free will of the internally displaced persons concerned.

VI. The consequences flowing from the violation of the rights of the Azerbaijani internally displaced persons, including restitution and compensation

117. There are a number of consequences that flow from the continuing violations of the rights of Azerbaijani internally displaced persons as detailed above. Brief comments only will be made.

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[148] Note also the London Declaration of International Law Principles on Internally Displaced Persons adopted by the International Law Association in 2000, which provides in article 5 that, "all internally displaced persons have the right to return to their homes or places of habitual residence freely and in security and dignity, as soon as the conditions giving rise to their displacement have ceased". 69 International Law Association, *Conference Report*, 2000, p. 794.

[149] See also the Report of the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe of 8 June 2009, document 11942, para. 10.

[150] Article III (59) (a).

[151] Article 1 of annex 7. Other examples include the Quadripartite Voluntary Agreement on Georgian Refugees and Internally Displaced Persons, 4 April 1994, para. 5; the Cotonou Agreement on Liberia, 25 July 1993, article 18 (1) and the Comprehensive Peace Agreement in the Sudan, 9 January 2005, chapter 4, para. 3 (a) and chapter 5, para. 2.

118. The primary consequence revolves around the responsibility of Armenia for such violations committed by itself directly, or indirectly by its subordinate local administration for whom it bears responsibility under the tests propounded by general international law and by the European Convention system.

A. Under general international law

119. The articles on State responsibility drawn up by the International Law Commission and commended to States by the General Assembly of the United Nations and which in relevant part reflects customary international law lays down the necessary framework.[152]

120. The primary principle is that every internationally wrongful act of a State entails the international responsibility of that State.[153] As the Permanent Court put it in the *Chorzow Factory* case:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".[154]

121. A State which is thus responsible is under an obligation to cease the wrongful act or acts and to offer appropriate assurances and guarantees of non-repetition.[155] Further, there is a duty of reparation, which must "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[156] This obligation, which exists irrelevant of any provision in domestic law,[157] has been formulated in article 31 of the ILC articles as follows:

> "(1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> (2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

122. The required full reparation may take the form of restitution, compensation and satisfaction either singly or in combination.[158] Restitution is the first of the forms of reparation laid down and involves the re-establishment of the situation existing before the internationally wrongful act.[159] It is the primary rule[160] and, in the words of the commentary to the ILC articles, "is of particular importance where

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[152] See above, para. 32 and following.

[153] Article 1 of the ILC articles. See also the *Phosphates in Morocco* case, *Preliminary Objections*, PCIJ, series A/B, No. 74, pp. 10, 28 (1938) and the *Corfu Channel*, I.C.J. Reports, 1949, pp. 4, 23.

[154] PCIJ, series A, No. 17, p. 21 (1928).

[155] See article 30 of the ILC articles. See also the *Rainbow Warrior*, 82 International Law Reports, pp. 499, 573 and the *LaGrand* case, I.C.J. Reports, 2001, p. 466.

[156] *Chorzow Factory*, PCIJ, series A, No. 17, pp. 47-8 (1928). See also the *Gabcikovo-Nagymaros* case, I.C.J. Reports, 1997, pp. 7, 80 and the *Genocide Convention* case, I.C.J. Reports, 2007, para. 460.

[157] Article 32.

[158] Article 34.

[159] Article 35, provided that by article 35 (a) this is "not materially impossible" and by article 35 (b) that it does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

[160] See *Chorzow Factory*, PCIJ, series A, No. 17, p. 48 (1928). See also the commentary to the ILC articles, Crawford, op. cit., p. 213.

the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law".[161]

123. Accordingly, the primary obligation upon Armenia is to ensure that the occupation of Azerbaijani territory is ended and that the various rights of the internally displaced persons of Azerbaijani ethnicity as detailed above are recognized and implemented. The forced displacement of ethnic Azerbaijanis constitutes a grave breach of Geneva Convention IV and may thus be seen as a breach of a peremptory norm. A similar conclusion is clear with regard to the discriminatory treatment of ethnic Azerbaijanis as the prohibition of ethnic or racial discrimination can be seen also as a peremptory norm.[162]

124. Other means of reparation, such as compensation, are only operative to the extent that restitution is "materially impossible"[163] and this is not the case with regard to the violations discussed above.[164] However, where used as a supplementary or complementary form of reparation to restitution, it is of current relevance. To the extent that restitution of property and possessions falls below the loss and/or damage suffered, monetary compensation would be required. This would cover, for example, the situation where property was damaged or destroyed or as a recompense for loss of access to possessions over the period of inaccessibility.

B. Under Geneva Convention IV

125. It should also be noted that under the regime of Geneva Convention IV, the breaches of article 49, as discussed above,[165] amount to "grave breaches" under article 147. Article 86 of Additional Protocol No. I provides that the parties to the Convention and Protocol are under a particular duty to "repress grave breaches". Further, the parties "shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Convention or of this Protocol".[166] This has implications for proceedings that may be brought both before domestic tribunals and before any relevant international tribunal, such as the International Criminal Court, jurisdiction permitting. It may also be a relevant factor in any inter-State proceeding that may, again jurisdiction permitting, be brought.

C. Under the European Convention on Human Rights

126. While an examination of the remedial system of the European Convention on Human Rights cannot be attempted in this paper, certain points need to be made.

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[161] Ibid., p. 215.

[162] See e.g. the *Barcelona Traction* case, I.C.J. Reports, 1970, pp. 3, 32 and the *Nicaragua* case, I.C.J. Reports, 1986, pp. 14, 100.

[163] See above, footnote 158.

[164] The other means of reparation, satisfaction, involves an acknowledgement of the breach plus a formal apology and while relevant as an additional factor is clearly not apposite or appropriate on its own in situations such as those under consideration, see article 37.

[165] See para. 53 and following.

[166] Article 88 of the Protocol.

127. Many of the violations of international law discussed above, also, as noted, constitute violations of the European Convention. To this extent, the mechanisms of the Convention are relevant. Individual or inter-State applications may be made, and the remedies concerned will involve the duty of the State found in violation to ensure that the breaches in question are ended and to provide compensation in form of "just satisfaction" under article 41.

VII. Conclusions

128. Armenia's actions, both directly by the use of its own forces and agents and indirectly through the use of its subordinate local administration in the occupied Nagorno-Karabakh and other elements for which it bears international responsibility, has breached international law in seizing and continuing to occupy and otherwise control Nagorno-Karabakh and surrounding areas of Azerbaijan. All these territories are internationally recognized as subject to Azerbaijan's sovereignty and have not been accepted as having any other status.

129. Such responsibility derives from effective control as that term has been defined in both general international law and under the European Convention on Human Rights.

130. Such responsibility includes liability for the violation of the relevant rights of the ethnic Azerbaijani internally displaced persons.

131. The violations of both general international law and of the European Convention have included the following:

(a) Forcible displacement from the occupied territories;

(b) Violation of the principle of non-discrimination on ethnic grounds both by the treatment of the internally displaced persons themselves and by the implantation of Armenian settlers in the occupied territories;

(c) Prevention of access to their properties and possessions;

(d) Failure to permit the return of the internally displaced persons to their homes.

132. The consequences of such violations under international law import obligations to cease the internationally unlawful acts and to afford restitution.